IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 848 of 2007
with
CRIMINAL MISC. APPLICATION No. 852 of 2007
with
CRIMINAL MISC.APPLICATION No. 856 of 2007
with
CRIMINAL MISC.APPLICATION No. 857 of 2007
with
CRIMINAL MISC.APPLICATION No. 860 of 2007
with
CRIMINAL MISC.APPLICATION No. 3881 of 2007
In
CRIMINAL MISC.APPLICATION No. 848 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MATESHWARI GAWAR GAM INDUSTRIES & 6 - Applicant(s)
Versus
BHUMI ENTERPRISE & 1 - Respondent(s)

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Appearance :

MR RUSHABH R SHAH for Applicant(s) : 1 - 7.
MR SP MAJMUDAR for Respondent(s) : 1,
MR KIRIT V CHAUDHARI for Respondent(s) : 1,
Mr. RC Kodekar, Addl. PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 11/07/2007

ORAL COMMON JUDGMENT

As common question of law and facts arise in these group of applications and they are between the same parties, all these applications are being disposed of by this common judgment and order.

2. Criminal Misc. Application No. 848 of 2007 is filed by the accused of Criminal Case No. 910 of 2004 pending in the Court of learned Chief Judicial Magistrate, Visnagar. Criminal Misc. Application No. 852 of 2007 is filed by the accused of Criminal Case No. 884/2006 pending in the Court of learned JMFC, Unjha. Criminal Misc. Application No. 856 of 2007 is filed by the accused of Criminal Case No. 885/2006 pending in the Court of JMFC, Unjha. Criminal Misc. Application No. 857 of 2007 is filed by the accused of Criminal Case No. 886/2006 pending in the Court of learned JMFC, Unjha, and Criminal Misc. Application No. 860 of 2007 is filed by the accused of Criminal Case No. 887/2006 pending in

the Court of learned JMFC, Unjha. All the aforesaid criminal cases are filed by the respective accused for the offences punishable under Section 138 read with Section 141 of The Negotiable Instruments Act [hereinafter referred to as “the Act”]. All these petitions/applications are filed by the respective applicants to quash and set aside the process/summons issued by the learned Trial Court issued against them in their aforesaid Criminal Cases.

3. At the outset, Shri R.R. Shah, learned advocate appearing on behalf of the respective petitioners does not press the Criminal Misc. Application No. 848 of 2007 so far as petitioners No. 1 and 2 are concerned and does not press the Criminal Misc. Application No. 852 of 2007, 856/2007, 857/2007 and 860/2007 so far as petitioners No. 1 and 7 are concerned. Thus, Criminal Misc. Application No. 848 of 2007 is dismissed as not pressed qua petitioners No. 1 and 2 and Criminal Misc. Applications No.

852/2007, 856/2007, 857/2007 and 860/2007 are dismissed as not pressed so far as petitioners No. 1 and 7 of the said applications are concerned.

4. With respect to rest of the accused of the aforesaid Criminal Cases, Shri R.R. Shah, learned advocate appearing on behalf of the respective petitioners has submitted that there are no averments/allegations against the petitioners satisfying ingredients of the provisions of Section 141 of the Act. It is submitted that there are no averments/allegations in the complaint by which the respective applicants can be held vicariously liable for the offences punishable under Section 141 of the Act. It is submitted that on bare reading of the respective complaints the only allegation is against the original-accused No. 1 and 2 in Criminal Case No. 910 of 2004 and against original-accused No. 1 and 7 in other criminal cases. It is submitted that in the complaint the respective petitioners are joined as partners

without there being further averments and/or allegations that they were in-charge and day to day affairs of the firm. Shri Shah, learned advocate appearing on behalf of the petitioners has relied upon the decision of the Hon'ble Supreme Court in the case of ***S.M.S. Pharmaceuticals Vs. Nita Bhalla & Another (2005) 8 SCC Page 89*** and has submitted that as held by the Hon'ble Supreme Court it is necessary to specifically aver in a complaint under Section 138 & 141 that at the time the offence was committed the present accused was in-charge of and responsible for the conduct of the business of the Company/Firm. It is submitted by him that as held by the Hon'ble Supreme Court the said averment is an essential averment under Section 141 and has to be made in a complaint and unless the said averments are made in the complaint the requirements of Section 141 cannot be said to have been satisfied. Under the circumstances it is requested to allow all applications by quashing and setting aside the order passed by the learned trial Court issuing summons against

the petitioners for the offences under Section 138 of the Act. It is also further submitted by the learned advocate appearing on behalf of the respective petitioners-accused that even otherwise in fact the respective petitioners have already retired as partners of the firm from with effect from 18.10.2003 much before the cheques in question were issued as the cheques have been issued for the period from 20th December 2003 to 24.2.2004 and therefore also the petitioners cannot be held liable for the cheques issued after they retired as partners. Shri Shah, learned advocate has relied upon the document of Retirement of Partnership dated 18.10.2003 as well as the certificate issued by the Registrar of Firms dated 23rd June 2004 and requested to quash the complaint so far as the petitioners are concerned.

5. Shri Shah, learned advocate appearing for the respective petitioners has relied upon decision of the Hon'ble Supreme Court in the case of ***Sham Sundar and others v. State of Haryana***, reported in ***AIR 1989 S.C. 1982*** in support of his

submission that when the offences are alleged to have been committed by the firm the partner responsible for carrying on the business and was during the relevant time in-charge of the business can only be convicted. He has also relied upon the decision of the Hon'ble Supreme Court in the case of ***Monaben Ketanbhai Shah and another v. State of Gujarat and others,*** reported in ***AIR 2004 S.C. 4274*** in support of his submission that to fasten the criminal liability against the partners for the offence under Section 141 of the Negotiable Instruments Act there must be necessary averments in the complaint that at the time when the offence was committed the partners were in-charge of and were responsible for the conduct of the business of the firm. Therefore it is requested to dismiss the complaint against the respective petitioners.

6. All these petitions are opposed by Shri SP Majmudar, learned advocate appearing on behalf of the original-complainant. He has submitted that considering the averments in the complaint

when the learned Trial Court has issued the summons against the respective petitioners original-accused for the offences punishable under Section 138 of The Negotiable Instruments Act the said order is not required to be interfered with in exercise of the powers under Section 482 of the Code of Criminal Procedure. It is submitted by him that whether the petitioners were in-charge of the firm or not etc., are all questions which are required to be considered at the time of trial on leading proper evidence and the same are required to be considered on appreciation of evidence. Shri Majmudar has relied upon the decision of the Hon'ble Supreme Court in the case of ***S.V. Muzumdar And Others Vs. Gujarat State Fertilizer Co. Ltd., And Another,*** reported in (***2005) 4 SCC Page 173*** in support of his submission. He has also relied upon the recent decision of the Hon'ble Supreme Court in the case of ***N. Rangachari Vs. Bharat Sanchar Nigam Limited*** reported in ***AIR 2007 S.C. Page 1682.*** It is also

further submitted by him that even in the said decision the Hon'ble Supreme Court has considered its own decision in the case of ***Monaben Ketanbhai Shah and another [supra]***. Shri Majmudar has also relied upon unreported decision of the Division Bench of this Court in the case of ***Shri Satish Chand Singhal Vs. The State of Gujarat & Others*** in ***Criminal Miscellaneous Application No. 6682 of 2005 and other cognate matters.*** It is submitted that as held by the Division Bench of this Court in the abovesaid case which is rendered after considering the decision of the Hon'ble Supreme Court in the case of ***Monaben Ketanbhai Shah and another [supra]***, the plea that the accused was not a Director of the Company at the relevant time or the contention that he had resigned as Director of the Company and therefore not liable to prosecution under Section 138 of the Act are all the defences pleaded by him and will have to be proved by him at the trial and therefore the complaint is not to be quashed under Section 482

of the Cr.P.C. Therefore it is requested to dismiss all the present applications. He has further submitted that even the accused have also not appeared before the learned Trial Court and therefore the discretionary powers under Section 482 of the Code of Criminal Procedure should not be exercised in favour of the petitioners.

7. Heard the learned advocates appearing on behalf of the respective parties. At the outset, it is to be noted that the allegations in the respective complaints are in relation to different cheques issued by the partnership firm between 20th December 2003 and 24th February 2004. It is also to be noted that the cheques were issued in favour of the original-complainants; they were presented to the respective bankers and the same were returned with endorsement “Insufficient Funds”; thereafter statutory notices were served and after non-payment of the amount as per the respective cheques within the statutory period the impugned complaints have been filed; and therefore all the ingredients for

making out a case under Section 138 of the Act are met with.

8. Now, the contention on behalf of the respective petitioners - partners of the firm is that no case is made out for vicarious liability under Section 141 of the Act as there are no averments in the complaint that they were in-charge of the partnership and were in day to day management of the firm. It is also the contention on behalf of the respective petitioners that they have already retired as partners with effect from 18.10.2003 and for that purpose they also relied upon necessary Entry in the Register of Firms. Now, it is required to be noted that the Entry in the Register of Firms with regard to retirement of the partners of the firm is after the impugned cheques are issued. Therefore, at the relevant time whether the petitioners were in-charge of and/or the conduct of day to day management of the firm are all the defences which are required to be considered at the time of trial as held by the Hon'ble Supreme

Court in the case of ***Monaben Ketanbhai Shah and another [supra]***, ***N. Rangachari Vs. Bharat Sanchar Nigam Limited [supra]*** and also by the Division Bench of this Court in the case of ***Shri Satish Chand Singhal [supra]***. Even otherwise, so far as the partnership firm is concerned, as per the provisions of the Indian Partnership Act all the partners are jointly and severally liable for any action by or against the partnership firm and considering the provisions of the Indian Partnership Act all the partners are vicariously liable. However, this Court is not considering the same at present in detail as the same may affect the parties at the time of trial. However, it is suffice to say that as all the aforesaid questions are required to be considered at the time of trial, the impugned complaints are not required to be quashed and set aside in exercise of powers under Section 482 of the Criminal Procedure Code. There are clear averments in the complaint that the accused No.1 is the partnership firm and accused No. 2 to 7 are the partners of the said firm and are

carrying on the business of purchasing and selling 'Gawar'. Therefore the question whether all the partners were in-charge of the partnership and/or the conduct of day to day management of the partnership firm are all defences which are required to be considered at the time of trial as held by the Hon'ble Supreme Court in the aforesaid decisions.

9. It is also required to be noted that the impugned complaints are of 2004 and the learned Trial Court has issued the processes/summons as far back as in the month of May 2004 whereas the present applications are filed in the year 2007 and the petitioners have even not appeared before the Trial Court. Considering the above also, the discretionary powers are not required to be exercised in favour of the petitioners. Even otherwise, as stated above, all the defences which are raised in the present applications are required to be considered and dealt with at the time of trial.

10. For the reasons stated above, all the applications are required to be dismissed and are accordingly dismissed without expressing any opinion on merits and/or the defences which are raised by the petitioners in the present applications are not adjudicated upon, and it is clarified that it will be open to the petitioners to lead proper evidence in support of their defence at the time of trial. With these, all these applications are dismissed. Rule/Notice is discharged. Ad-interim relief granted earlier stands vacated forthwith.

11. In view of the dismissal of Criminal Miscellaneous Application No. 848 of 2007 and other cognate applications, no order in Criminal Miscellaneous Application No. 3881 of 2007.

[M.R. Shah, J.]

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